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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN ALEXANDER GOMEZ, Defendant and Appellant.	B206169 (Los Angeles County Super. Ct. No. GA 062497)

APPEAL from a judgment of the Superior Court of Los Angeles County, Zaven V. Sinanian, Judge. Affirmed.

Solomon Wollack, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Christian Alexander Gomez was convicted of one count of first degree murder and two counts of willful, deliberate and premeditated attempted murder. He was also convicted of personally and intentionally discharging a firearm in the commission of all three offenses and of committing these crimes for the benefit of a criminal street gang. He was sentenced to 25 years to life on the murder count and to an additional 25 years on the firearm enhancement, with a minimum parole eligibility of 15 years based on the gang enhancement. He was sentenced to consecutive life sentences on the two attempted murder counts, plus 25 years on both counts based on the firearm enhancements. The court stayed the gang enhancement on the attempted murder convictions.

We find that substantial evidence supports the convictions and that there was no infirmity in the jury instructions. We therefore affirm the judgment.

FACTS

At approximately 1:00 p.m. on August 8, 2005, appellant, Michael Herrera and Roberto Rosales drove to Glendale High School in a white Toyota to look for girls.[1] Herrera was driving, Rosales was in the front passenger seat and appellant sat in the back seat. Finding the school empty, the trio drove on into Glendale. Appellant, who was a member of the Temple Street gang, told Rosales that he wanted to "go fishing." Rosales did not understand what appellant meant by this. Los Angeles Police Officer Brandon Purece explained at trial that members of the Temple Street gang refer to Toonerville gang members derisively as "tuna fishes" or "the fishes." "Going fishing" means going to look for Toonerville gang members.

Herrera drove down Palmer Avenue and past Mariposa Street. Appellant pointed out three men on Mariposa Street. They were Esteban Rivera, Carlos Perdomo and Jaser Zabaleta; all three men were on their way to a liquor store.

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[1] The ensuing events were related in large part by Rosales who testified under a grant of immunity; appellant and Herrera were to be charged with murder and attempted murder.

Perdomo and Zabaleta were on foot and Rivera was riding a bicycle. Perdomo was a member of the Toonerville gang. Rosales thought that Zabaleta was also a gang member.

Appellant told Herrera to turn the car around, which he did, driving the car onto Mariposa Street. Rosales now saw Rivera, Perdomo and Zabaleta near a parking lot. Appellant told Herrera to stop the car. Appellant said that he was "going to . . . hit these people up." Rosales heard a clicking noise that sounded like a gun being loaded.

Appellant got out of the car and walked toward Perdomo and Zabaleta who were walking across the parking lot; Rivera, on his bike, was 26 feet ahead of Perdomo and Zabaleta. Rivera, who testified at trial, heard four gunshots in quick succession. Rivera turned around and saw a Hispanic man of medium build running toward a white Toyota on Mariposa Street.

According to Rosales, after appellant got out of the car, Herrera pulled the car into a driveway to turn around. Rosales testified that while the car was still in the driveway, he heard two or three gunshots.

Rivera now looked for his friends Perdomo and Zabaleta. Perdomo was coming out from behind a wall. Zabaleta was standing up and started walking further into the parking lot until he fell down. Zabaleta had been shot three times. The shots to his right lower back and his left side were fatal; he had also been shot in his right shoulder. Two bullets were recovered from his body.

Rosales testified that when appellant returned to the car "[h]e's fired up, and he's like, I think -- he's like, 'I got him,' or something, like hyped up, like hyped up." Appellant gave Herrera directions to the freeway. Aside from this, there was no conversation in the car. Rosales thought that appellant had shot someone, but he wasn't sure. Herrera drove away from the scene at normal speed and headed for appellant's house.

Sanitation worker Jose Vallejo also witnessed the shooting. Vallejo was working on Mariposa Street when he saw a man running backward from a parking lot on Mariposa, firing shots toward the parking lot. The shooter ran toward a white

Toyota that was 30 to 40 feet from Vallejo. According to Vallejo, the shooter was wearing a blue jersey, had short black hair, was five feet and an inch tall and appeared to be about 18 years old. (Appellant was 20 when the shooting occurred and was five feet three or four inches tall. Vallejo told the police that the shooter was five feet five inches tall.)

The shooter got into the back seat of the Toyota; Vallejo saw two others in the car, which drove off. Vallejo and a coworker ran to their truck and followed the Toyota. Vallejo was able to read the car's license number, which his coworker wrote down. Vallejo drove back to the scene of the shooting where he gave a police officer the license number. The license number of the Toyota led the police to Herrera, who was arrested on the day of the shooting.

Once they arrived at appellant's house, appellant, Herrera and Rosales played basketball with some people; they did not talk about the shooting.

Appellant's house was searched the morning after the shooting. The officers found a blue Dodgers jersey. In the closet of appellant's room, the officers found notebooks with gang writing on them and a .380-caliber bullet. The windows of appellant's room looked out on the roof of a business building. On that roof officers found a box containing ammunition with gang writing on it, including the moniker "Malo"; a .380-caliber semiautomatic gun with paperwork concerning the gun; and miscellaneous bullets. Appellant's left thumbprint was on the box of ammunition.

Four bullet casings and one fired bullet found on the scene of the shooting, and the two bullets recovered from Zabaleta's body were fired from the gun found on the roof outside appellant's room.

Officer Purece testified that the Temple Street gang had approximately 180 members in 2005 and that the gang's symbol is "T.S.T." or "V.T.R.," which stands for the Spanish phrase Varrio Temple Riva or Temple Street gang. Photographs on appellant's computer showed him making the Temple Street gang sign and other writings gave appellant's gang moniker as Malo. A tattoo on appellant's forearm of

"757" could be read as T.S.T. Purece concluded that appellant was a member of the Temple Street gang and that the shooting was committed for the benefit of that gang.

DISCUSSION

1. It Was Not Necessary to Define "Conspiracy" in the Accomplice Instruction

The trial court, using Judicial Council of California Criminal Jury Instructions (2007) CALCRIM No. 334, instructed the jury that if it found that Rosales was an accomplice, the jury could not convict appellant on the strength of Rosales testimony alone. Among other things, this instruction defines an accomplice as someone who participates "in a criminal conspiracy to commit the crime." Appellant contends that the trial court should have defined the word conspiracy because, absent such a definition, "the jury had no way to assess whether Robert Rosales participated in a conspiracy to attack rival gang members. As the conspiracy theory provided the jury with, by far, the strongest ground for finding Rosales to be an accomplice, the failure to instruct on this theory meant that the jury, in all likelihood, did not find Rosales to be an accomplice." This also meant that the jury did not view Rosales's testimony with caution.

Respondent points out, correctly, that the claim that the accomplice instruction is incomplete without a definition of conspiracy should have been made in the trial court and that, absent such a claim, the point may not be raised for the first time on appeal. "A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

Even if the point would not have been waived, appellant's contention is not persuasive. On the facts of this case, it is quite clear what conspiracy means. Was Rosales part of an agreement to go looking for Toonerville gang members and assault them? While there may be cases when conceivably it would be advisable to define the word conspiracy in the accomplice instruction, this is not such a case.

But, even if we assume that the court should have given an instruction on the definition of a conspiracy, there was no prejudice. Rosales, a much discredited

witness, was testifying under a grant of immunity, which clearly signaled that the prosecutor viewed Rosales as a person who was at least "involved" in the crime. The jury would therefore take his testimony with the proverbial grain of salt, which would have been the point of the instruction appellant claims should have been given.

2. The Evidence Is Sufficient to Sustain the Convictions for Attempted Murder

Appellant contends that there is no substantial evidence to show that either Perdomo or Rivera was "actually in the kill zone at the time the four shots were fired" and that for this reason the motion to dismiss the attempted murder counts should have been granted.

The trial court gave this issue careful consideration when it ruled on appellant's motion to dismiss the attempted murder counts. Citing *People v. Bland* (2002) 28 Cal.4th 313 and *People v. Smith* (2005) 37 Cal.4th 733, the trial court focused on the facts that appellant used a semiautomatic weapon, not a revolver, and that he fired several shots in the direction of the group, which was a combination "devastating enough to kill everyone in the group if contact had been made."

We agree with the trial court. The illustration of a "kill zone" given by the court in *People v. Bland*, *supra*, 28 Cal.4th at page 330 fits this case almost perfectly: "'[C]onsider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'"

It stands to reason that firing a semiautomatic weapon repeatedly in the direction of the group composed of Perdomo, Rivera and Zabaleta put all three men in deadly peril; it is not as if Zabaleta was on the other side of the street. Another way of looking at this is that Rivera and Perdomo surely could have been hit by this fusillade and that they were lucky that they escaped injury or death.

That the three men were in a group in reasonable proximity to each other was not only shown by Rosales's testimony, which had them walking together toward a liquor store; Perdomo testified that he was less than 10 feet from Zabaleta and about 10 feet away from Rivera. And there is evidence that appellant intended to attack the entire group. This was his statement just before he got out of the car that he was "going to . . . hit these people up."

"Whether the evidence presented at trial is direct or circumstantial . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Towler* (1982) 31 Cal.3d 105, 118.) Given this standard, we are not persuaded by appellant's selection of certain facts that might have supported not guilty verdicts on the attempted murder counts. As an example, while the fact that Rivera saw Perdomo come out from behind a wall after the shooting stopped suggests that Perdomo may not have been in the kill zone, it is also reasonable to conclude that Perdomo was near Zabaleta and dove for cover when the shooting started.

Because there is substantial evidence that supports the verdicts on the attempted murder counts, it follows that the trial court was correct it denying the motion to dismiss these counts. "A trial court should deny a motion for acquittal under [Penal Code] section 1118.1 when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged." (*People v. Mendoza* (2000) 24 Cal.4th 130, 175.)

3. The Predicate Offenses Satisfy the Criteria of Penal Code Section 186.22, Subdivision (e)

It was shown by means of certified copies of the clerk's minutes that on January 21, 2004, Temple Street gang member Rene Phillip Chavez was convicted of kidnapping and that on May 19, 2006, Temple Street gang member Andres Jesus Santana was sentenced on conviction for false imprisonment, assault with a deadly weapon, kidnapping, robbery, attempted robbery and making a criminal threat.

Penal Code section 186.22, subdivision (e) (hereafter section 186.22(e)) provides in pertinent part: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons."

Appellant contends that while the dates of the convictions were provided, the dates that the offenses occurred were not shown. Thus, the requirement that "the last of those offenses occurred *within three years* after a prior offense" (italics added) was not met.

This contention does not appear to have been advanced in the trial court. If a timely objection had been made, the prosecution could have supplied the dates of the offenses. Thus, this argument should not be made for the first time on appeal.

It is also true that appellant's contention ignores the fact that under section 186.22(e) the predicate offenses may be proved by a showing of the fact of conviction rather than proof of the underlying conduct. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1461, fn. 5.) When the predicate offense is proved by the fact of conviction, as was done in this case, the date that the underlying offense or offenses were committed may very well not appear on the document used to prove the conviction. This means that the word "offense" in the phrase "the last of those offenses occurred within three years after a prior offense" in section 186.22(e) may be understood to refer to the *fact of conviction* and not the underlying crime or crimes.

"'[T]he court must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy.'" (*Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1223.) The construction appellant places on the word "offense" would seriously impair the ability of the prosecution to prove a predicate offense by documentary proof

of the prior conviction. The obvious purpose of the three-year rule is to ensure that offenses that are very distant in time are not used to show a *pattern* of criminal gang activity. The date of the conviction satisfies this consideration.

DISPOSITION

The judgment is affirmed.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.